Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-263

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROY M. MIYAMOTO,
Appellant,

v.

OFFICE OF THE DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF
THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

GERALD H. KIBE
Chief Disciplinary Counsel
Office of Disciplinary Counsel
Suite 600
1164 Bishop Street
Honolulu, Hawaii 96813
(808) 521-4591

RICHARD R. CLIFTON
(Counsel of Record)
Special Assistant Disciplinary Counsel
Suite 1200
1000 Bishop Street
Honolulu, Hawaii 96813
(808) 521-9200

Counsel for Appellant

October 1986

No. 86-263

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROY M. MIYAMOTO,
Appellant,

v.

OFFICE OF THE DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF
THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

GERALD H. KIBE
Chief Disciplinary Counsel
Office of Disciplinary Counsel
Suite 600
1164 Bishop Street
Honolulu, Hawaii 96813
(808) 521-4591

RICHARD R. CLIFTON
(Counsel of Record)
Special Assistant Disciplinary Counsel
Suite 1200
1000 Bishop Street
Honolulu, Hawaii 96813
(808) 521-9200

Counsel for Appellant

October 1986

QUESTION PRESENTED

Whether the procedures employed by the Supreme Court of Hawaii to discipline Appellant, who was suspended from the practice of law in the State of Hawaii for 18 months, violated Appellant's due process and equal protection rights under the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	2
ARGUMENT	10
1. Appellant presents nothing more than arguments this Court rejected in Mildner v. Gulotta	10
a. By summarily affirming Mildner v. Gulotta on direct appeal, this Court rejected the attack on the constitutionality of New York's attorney disciplinary procedure ...	11
b. The issues decided in Mildner v. Gulotta are substantially identical to the issues raised here	16
2. The Hawaii attorney disciplinary procedure did not deprive Appellant of the due process required for proceedings of that nature	22

Page

3. The Hawaii attorney disciplinary procedure did not deprive Appellant of his rights under the equal protection clause 43

CONCLUSION 48

TABLE OF AUTHORITIES

Cases	Page
Andros, In re, 64 Ill. 2d 419, 356 N.E.2d 573 (1976)	25
Attorney General v. Lane, 259 Mich. 283, 243 N.W. 6 cert. den. 287 U.S. 654 (1932)	23
Barsky v. Board of Regents of the University of the State of New York, 347 U.S. 442 (1954)	34-36
Cafeteria Workers v. McElroy, 367 U.S. 886 (1961)	24
Cain v. Board of Commissioners of the Alabama State Bar, 345 So. 2d 1343 (Ala. 1977)	37
Capshaw, In re, 65 S. Ct. 673 (1945), and 67 S. Ct. 1345 (1947)	42

Cases	Page
Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Behnke, 276 N.W.2d 838 (Iowa) appeal dismissed, 444 U.S. 805 (1979)	36
Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Michelson, 345 N.W.2d 112 (Iowa 1984)	40
Corn Exchange Bank v. Coler, 280 U.S. 218, 222-223 (1930)	41
Crow, In re, 359 U.S. 1007 (1959)	42
Disciplinary Board of the Hawaii Supreme Court v. Kim, 59 Hawaii 449, 583 P.2d 333 (1978)	25, 27, 33, 39
Echeles, In re, 430 F.2d 347 (7th Cir. 1970)	23, 28
Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972) ...	46

Cases	Page
Gerzof v. Gulotta, 395 N.Y.S.2d 26 (1977)	15
Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974)	15
Herring v. New York, 422 U.S. 853 (1975)	26
Hicks v. Miranda, 422 U.S. 332 (1975)	16
Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974)	44-45
Kaiser, Matter of, 489 N.Y.S.2d 735 (1985)	37, 40
Kitsis v. State Bar, 153 Cal. Rptr. 836, 592 P.2d 323 (1979)	33
Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971)	21
Logan, Matter of, 70 N.J. 222, 358 A.2d 787 (1976) ...	33, 47

Cases	Page
Maddy v. First Dist. Committee of Virginia State Bar, 205 Va. 652, 139 S.E.2d 56 (1964)	23
Mathews v. Eldridge, 424 U.S. 319 (1976)	24, 31
McComb v. Commission on Judicial Performance, 19 Cal. 3d S 1, 138 Cal. Rptr. 459, 564 P.2d 1 (1977)	23
Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y. 1975), affirmed, 425 U.S. 901 (1976)	10-21, 37, 47
Morales, In re, 35 Cal. 3d 1, 196 Cal. Rptr. 353, 671 P.2d 857 (1983)	40
Morgan v. United States, 298 U.S. 468 (1936)	30
Morrissey v. Brewer, 408 U.S. 471 (1972)	23

Cases	Page
MTM Inc. v. Baxley, 420 U.S. 799 (1975)	14
Noell, In re, 93 F.2d 5 (8th Cir. 1937)	38
Osceola v. Kuykendall, et al., 434 U.S. 914 (1977)	14
Ownbey v. Morgan, 256 U.S. 94 (1921)	41
People v. Hartmann, 638 P.2d 745 (Colo. 1981)	26
People v. Hickman, 204 Cal. 470, 268 P. 909 (1928)	41
Petty, In re, 29 Cal. 3d 356, 173 Cal. Rptr. 461, 627 P.2d 191 (1981)	25, 28
Polk v. State Bar of Texas, 480 F.2d 998 (5th Cir. 1973)	22

Cases	Page
Pordum v. Board of Regents of the State of New York, 491 F.2d 1281 (2d Cir. 1974)	44
Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. den., 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985)	29
Ruffalo, In re, 390 U.S. 544 (1967)	22
Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935)	44
Spencer v. Spencer, 434 U.S. 807 (1977)	14
Stivers v. Minnesota, 429 U.S. 1084 (1977)	14
Stout, Matter of, 122 Ariz. 503, 596 P.2d 29 (1979)	25, 28
Theard v. United States, 354 U.S. 278 (1957)	45

Cases	Page
Trask, In re, 46 Hawaii 404, 380 P.2d 751 (1968) ...	39
Tully v. Griffin, Inc., 429 U.S. 68 (1976)	16
United States v. Raddatz, 447 U.S. 667 (1980)	29-31
United States v. Vater, 259 F.2d 667 (2d Cir. 1958)	21
Walker v. Supreme Court of Arkansas Committee on Professional Conduct, 275 Ark. 158, 628 S.W.2d 552 (1982)	34
Wall, Ex Parte, 107 U.S. 265, 27 L. Ed. 552 (1883)	22, 41, 42
Walton, In the Disciplinary Matter Involving, 676 P.2d 1078 (Alaska 1983)	34
Wireman, In the Matter of, 270 Ind. 344, 367 N.E.2d 1368 (1977)	32, 40

Cases	Page
Zuckerman v. Greason, 231 N.E.2d 718, 285 N.Y.S.2d 1, cert. den., 390 U.S. 825 (1967)	22
Statutes and Rules	
Hawaii Rev. Stat., chapter 91	43
Hawaii Rev. Stat. § 605-1	46
Rule 2, Rules of the Supreme Court of Hawaii	2-6, 27, 32
12 U.S.C. § 1253	14, 15
28 U.S.C. § 636(b)(1)(B)	29
42 U.S.C. § 1983	16
Other	
American Bar Association, Survey of Lawyer Disciplinary Procedures in the United States (1984)	41
R. Stern & E. Gressman, Supreme Court Practice (5th ed. 1978)	32

No. 86-263

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROY M. MIYAMOTO,
Appellant,

v.

OFFICE OF THE DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF
THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of

the Supreme Court of Hawaii on the ground that the questions presented are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This appeal raises the question of whether the procedures employed by the Supreme Court of Hawaii to discipline Appellant, an attorney licensed to practice law in Hawaii, violated Appellant's due process and equal protection rights under the United States Constitution. The procedures are set out in Hawaii Supreme Court Rule 2, which has been submitted as Appendix C to the Jurisdictional Statement.

An attorney licensed to practice law in Hawaii is subject to the exclusive disciplinary jurisdiction of the Hawaii Supreme Court. Hawaii Supreme Court Rule 2.1. The Hawaii

Supreme Court appoints an eighteen member Disciplinary Board to serve in an adjunct capacity to the court in all disciplinary proceedings. Hawaii Supreme Court Rule 2.4. The Disciplinary Board, in turn, appoints a Disciplinary Counsel who makes all preliminary investigations of attorney misconduct. Upon the conclusion of this initial investigation, Disciplinary Counsel recommends to the Disciplinary Board either dismissal, informal admonition of the attorney concerned, or the institution of formal disciplinary proceedings before a Hearing Committee. This recommendation is reviewed by one of the two members of the Disciplinary Board assigned by the Board Chairman for this purpose. Hawaii Supreme Court Rules 2.4 & 2.7.

If the reviewing member of the Disciplinary Board, in accordance with the recommendation of the Disciplinary

Counsel, believes that the Disciplinary Board should institute formal disciplinary proceedings, he or she authorizes the Disciplinary Counsel to notify the accused attorney of the specific charges of alleged misconduct. Next, the Chairman of the Disciplinary Board refers the matter to a three-member Hearing Committee. The Disciplinary Board appoints all Hearing Committees. At least two of each committee's three members must be members of the Hawaii bar. Hawaii Supreme Court Rules 2.5 & 2.7.

A formal hearing of the alleged misconduct takes place in front of the Hearing Committee. Where factual issues are to be resolved, the accused attorney has the full opportunity to confront and cross-examine the complainant and other witnesses presented by the Disciplinary Counsel. The accused attorney may also present evidence on his or her own

behalf. At the conclusion of the hearing, the Hearing Committee must submit to the Disciplinary Board a report containing its findings and recommendations, including any previously submitted briefs. Hawaii Supreme Court Rule 2.7(b).

Upon receipt of the Hearing Committee Report, the Disciplinary Board must set a date for the submission of briefs and for oral arguments before the Board. After oral argument, the Board must either affirm or modify the recommendation of the Hearing Committee, remand the matter for further proceedings before the Hearing Committee or dismiss the petition. Next, the Disciplinary Board must submit a report containing its findings and recommendations, together with the entire record, to the Hawaii Supreme Court. If the accused attorney objects to the Disci-

plinary Board's report, he or she may submit a brief with the court stating his or her position. Hawaii Supreme Court Rule 2.7(c).

The Hawaii Supreme Court Rules do not obligate the court to grant the accused attorney the opportunity of oral argument before it. Furthermore, the Disciplinary Board's recommendation is not binding upon the Hawaii Supreme Court. The court may affirm or dismiss any portion of the Disciplinary Board's findings. Lastly, the Hawaii Supreme Court does not have to submit findings of fact or conclusions of law in its final order on the matter.

The procedures were followed in the case of Appellant. The Disciplinary Counsel recommended that disciplinary proceedings be initiated, and the matter was referred to a Hearing Committee. After reviewing evidence and argument,

the Hearing Committee unanimously adopted findings of fact which held, in essence, that Appellant had altered a letter from a physician concerning a medical opinion (by inserting the word "not" into the letter) and had submitted the altered letter as evidence to a hearings officer conducting an administrative hearing to determine whether Appellant's client was entitled to receive worker's compensation benefits. Concluding that Appellant had thereby violated several of the Disciplinary Rules contained in the Code of Professional Responsibility, as adopted in Hawaii, the Hearing Committee recommended that Appellant be suspended from the practice of law for three years.

The Hearing Committee's Findings of Fact, Conclusions of Law, and Recommendation for Discipline were submitted to the Disciplinary Board. After

considering a brief from Appellant, an answering brief from the Disciplinary Counsel, and a reply brief from Appellant, and after hearing oral argument, the Board unanimously (among those members participating) determined that the findings of fact made by the Hearing Committee were supported by the evidence, and adopted and affirmed the findings of fact, the conclusions of law, and the recommendation of the Hearing Committee.

The Report and Recommendation of the Disciplinary Board was submitted to the Supreme Court of Hawaii, along with the record. Appellant submitted an opening brief, the Disciplinary Counsel filed an answering brief, and Appellant filed a reply brief. Among the arguments presented by Appellant was the contention that the recommended sanction of suspension for three years was too

harsh in light of Appellant's good record and of caselaw from Hawaii and other jurisdictions imposing lesser sanctions for similar offenses. Thereafter, the Hawaii Supreme Court unanimously entered an Order of Suspension (Appendix A to the Jurisdictional Statement), concluding that suspension of Appellant was necessary, but reducing the period of suspension to 18 months. Appellant subsequently filed a motion for reconsideration, but that motion was denied (Appendix B to the Jurisdictional Statement). This appeal followed.

Appellant does not claim that the Hawaii Supreme Court failed to follow its established procedure in any substantial or material way. Rather, Appellant argues that the Hawaii attorney disciplinary procedure as a whole violates accused attorneys' due process and equal protection rights.

ARGUMENT

1. APPELLANT PRESENTS NOTHING MORE THAN ARGUMENTS THIS COURT REJECTED IN MILDNER v. GULOTTA

Appellant's Jurisdictional Statement is in form and substance an edited version of the dissenting opinion in Mildner v. Gulotta, 405 F. Supp. 182, 201-229 (E.D.N.Y. 1975),[1/] a case wherein the majority of a three-judge district court panel upheld the constitutionality of the New York attorney disciplinary procedure. This Court rejected those views when it summarily affirmed the panel's majority decision on direct appeal. Mildner, 425 U.S. 901 (1976).

1/ Curiously, Appellant failed to cite this case in his Jurisdictional Statement.

a. By summarily affirming Mildner v. Gulotta on direct appeal, this Court rejected the attack on the constitutionality of New York's attorney disciplinary procedure.

This Court's affirmance of the decision in Mildner v. Gulotta clearly rejected the constitutional arguments raised by the plaintiffs. Nevertheless, some confusion as to what exactly the district court decided could arise from a casual reading of the lower court's three opinions. The district court panel considered two broad issues: (1) whether the New York attorney disciplinary procedure violated the United States Constitution, and (2) whether the doctrine of judicial abstention prevented the district court panel from disposing of the case on its merits, e.g., on constitutional grounds.

The panel upheld the constitutionality of the New York attorney dis-

ciplinary procedure, 2 - 1. The opinion which stated the decision of the court was written by Judge Neaher, who concluded that plaintiffs' constitutional claims were without merit. Mildner, 405 F. Supp. at 199. Judge Moore concurred on the constitutional issues, stating that he would "hold that New York's procedures for disciplining its attorneys are constitutional for the reasons stated in Judge Neaher's opinion." Id. Judge Weinstein, on the other hand, dissented and concluded that the New York attorney disciplinary procedures denied accused attorneys due process. Id. at 229.

The panel also held, 2 - 1, that the doctrine of abstention did not prevent the court from reaching the merits of the case. Judge Neaher believed that the court should dismiss the complaints based on the doctrine of

abstention, and he expressed that view in the lead opinion. 405 F. Supp. at 199. But that position was not adopted by a majority of the court. Judge Moore believed the court should dismiss the complaints, not on the basis of abstention, but on the "merits" of the constitutional claims. Id. Judge Weinstein also concluded that the doctrine of abstention was inapplicable. Id. at 207.

In sum, the panel held that: (1) the New York attorney disciplinary procedure did not violate the United States Constitution; and (2) the doctrine of abstention did not apply, such that it was necessary to reach the merits of the constitutional claim.

This Court was obviously aware of these holdings when it affirmed the district court judgment upon plaintiffs' direct appeal from the three-judge

district court panel under 28 U.S.C. § 1253. This Court has stated that it has no jurisdiction to hear a direct appeal from a three-judge district court when the district court panel did not reach the merits of plaintiff's constitutional attack, but instead based its order on the doctrine of abstention. MTM Inc. v. Baxley, 420 U.S. 799, 804 (1975). In other words, this Court would never have "affirmed" the district court decision if the district court had disposed of the case on the grounds of abstention. Rather, the Court would have dismissed the appeal for want of jurisdiction, Osceola v. Kuykendall, et al., 434 U.S. 914 (1977); Spencer v. Spencer, 434 U.S. 807 (1977), or would have remanded the case to the district court for a fresh order from which a timely appeal could have been taken to the court of appeals. Stivers v. Minne-

sota, 429 U.S. 1084 (1977). The Court would therefore not have taken jurisdiction of the appeal if it believed the district court case was decided on the basis of abstention rather than the constitutional issues. Gerzof v. Gulotta, 395 N.Y.S.2d 26, 27 (1977).

By way of summary affirmance, this Court must therefore have ruled on the merits of the constitutional issues raised in Mildner, as discussed in the dissenting opinion and repeated by Appellant here. As this Court stated in Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 98 (1974), direct appeal from a district court panel under 28 U.S.C. § 1253 "authorizes direct review by this Court . . . as a means of accelerating a final determination on the merits." The fact that this Court summarily affirmed Mildner is of no import; summary disposition of an appeal

is still a disposition on the merits. Tully v. Griffin, Inc., 429 U.S. 68 (1976); Hicks v. Miranda, 422 U.S. 332 (1975).

b. The issues decided in Mildner v. Gulotta are substantially identical to the issues raised here.

Mildner involved three consolidated civil rights actions brought under 42 U.S.C. § 1983 to test the constitutionality of the procedures used by the State of New York to discipline attorneys charged with professional misconduct. Under the New York procedure, the Appellate Division of the Supreme Court of New York had the exclusive jurisdiction to discipline members of the New York bar. Initially, courts and attorneys would refer complaints concerning potential attorney misconduct to a bar association grievance committee. The Appellate Division empowered the grievance committee to

make a preliminary investigation of the complaint and recommend to the Appellate Division whether the court should institute formal disciplinary proceedings, a recommendation the court normally adopted.

Once the Appellate Division instituted formal disciplinary proceedings, the court would refer the proceedings to a referee to conduct a hearing, take testimony, and report to the court findings of fact, conclusions of law, and a recommendation as to the disposition of the case. The findings and recommendation of the referee were in no way binding on the court. Upon motion by either party, or upon its own initiative, the court could affirm or disaffirm, in whole or in part, the referee's report. The Appellate Division could, and at times did, substitute its judgment for that of the

referee. Indeed, in two of the three cases involved in Mildner, the referees had concluded that the charges against the accused attorneys had not been sustained by the evidence, but the Appellate Division held otherwise, finding the charges sustained by the proof. In its consideration, the court was not obligated to afford an oral hearing or oral argument concerning adoption, modifications, or rejection of the report. Furthermore, the court was not obligated to include written findings in its final order.

Essentially, the plaintiffs in Mildner attacked the constitutionality of the New York disciplinary procedure on the same due process and equal protection grounds put forth by Appellant here. Speaking for the two-judge majority, Judge Neaher stated, "In our examination of the parties' submissions

we have found no substantial merit in the plaintiffs' claims and conclude that the respective complaints should be dismissed." Mildner, 405 F. Supp. at 185.

The court held that due process did not require the ultimate trier of fact in attorney disciplinary proceedings to hear witnesses and accused attorneys personally either through oral argument or a de novo hearing. Mildner, 405 F. Supp. at 195. In reaching this conclusion the court noted that "the use of masters or referees as advisory triers-of-fact is a well-established instrument of busy appellate courts exercising original jurisdiction." Id. Furthermore, the court held that due process only required the court to review and consider the referee's report, it did not require the court to provide written findings of fact and

conclusions of law. Id. Lastly, with respect to the plaintiffs' equal protection claim, the court focused on the unique nature of attorney disciplinary proceedings and the special relationship between courts and attorneys, holding that the state could legitimately find reasons to conclude that different procedural safeguards were appropriate for different professions. Id. at 193.

The procedure used by the State of Hawaii to discipline attorneys is closely analogous to the New York procedure reviewed and upheld in Mildner. The Supreme Court of Hawaii (the highest court in the State of Hawaii) has the ultimate authority in all Hawaii disciplinary cases. It acts upon the nonbinding recommendations of a disciplinary board and hearing committee, the body before which formal hearings

occur. And, as the present case reveals, the Hawaii Supreme Court Rules do not obligate the court to hear testifying witnesses or the accused attorney personally and do not require the court to produce written findings of fact and conclusions of law. In sum, the disciplinary procedure currently under attack is substantially equivalent to the disciplinary procedure this Court upheld in Mildner, 425 U.S. 901 (1976).[2/]

2/ Again, this is not surprising, given the fact that Appellant's arguments are taken from a dissenting opinion rejected first by the district court majority and then by this Court. Actually, Appellant's Jurisdictional Statement is sprinkled with arguments courts have rejected. On at least two occasions Appellant quotes language from cases without acknowledging that the quoted language came from dissents. See, Jurisdictional Statement at 32 and 42, quoting Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 174 (1971) (Black, J., dissenting); United States v. Vater, 259 F.2d 667, 674 (2d Cir. 1958) (Lumbard, J., dissenting).

2. THE HAWAII ATTORNEY DISCIPLINARY PROCEDURE DID NOT DEPRIVE APPELLANT OF THE DUE PROCESS REQUIRED FOR PROCEEDINGS OF THAT NATURE

Appellant evaluates Hawaii's attorney disciplinary procedure only by reference to what he calls its "quasi-criminal" nature. In so doing, Appellant misinterprets, and consequently misapplies, constitutional standards applicable to these proceedings. Besides referring to attorney disciplinary proceedings as "quasi-criminal", In re Ruffalo, 390 U.S. 544, 551 (1967), reh. denied, 391 U.S. 961 (1968), this Court and others have called such proceedings "civil" in nature. Ex Parte Wall, 107 U.S. 265, 27 L. Ed. 552, 561 (1883); Polk v. State Bar of Texas, 480 F.2d 998, 1002 (5th Cir. 1973); Zuckerman v. Greason, 231 N.E.2d 718, 721, 285 N.Y.S.2d 1, 6, cert. den., 390

U.S. 825 (1967); Attorney General v. Lane, 259 Mich. 283, 243 N.W. 6, 8, cert. den., Lane v. Voorhies, 287 U.S. 654 (1932). Courts have also referred to these proceedings as "sui generis." In re Echeles, 430 F.2d 347, 349 (7th Cir. 1970); McComb v. Commission on Judicial Performance, 138 Cal. Rptr. 459, 463, 564 P.2d 1, 5 (1977); Maddy v. First Dist. Committee of Virginia State Bar, 205 Va. 652, 139 S.E.2d 56, 60 (1964). Clearly, labelling the nature of attorney disciplinary proceedings is an exercise in semantics that does not itself determine the substantive constitutional limitations to be applied in this context.

Due process is a flexible concept which tolerates variations and requires only those procedural protections as a particular situation may demand. Morrissey v. Brewer, 408 U.S.

471, 481 (1972); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). The dictates of due process therefore fall upon a sliding scale that varies depending upon the particular procedure under scrutiny. In Mathews v. Eldridge, 424 U.S. 319, 335 (1976), this Court set forth three factors to consider in determining a particular procedure's due process requirements: (1) the private interests implicated; (2) the risk of erroneous determination through the use of the procedures and the probable value of added procedural safeguards; and (3) the public interest and administrative burdens, including costs that additional procedures would entail. Applying this test to the Hawaii attorney disciplinary procedure confirms that the Hawaii procedure amply protects accused attorneys' due process rights.

Appellant asserts that his due process rights derive from the personal interests in his reputation and livelihood at stake in the disciplinary procedure. Nevertheless, Appellant over-analogizes the proceedings to a criminal trial. The deprivation to be suffered by the accused attorney is not the same as that of a convicted felon, and the point of the proceeding is not to inflict punishment. Regardless of the varying labels courts have placed on attorney disciplinary proceedings, courts agree that these proceedings are not criminal or punitive in nature. In re Petty, 29 Cal. 3d 356, 173 Cal. Rptr. 461, 627 P.2d 191, 193 (1981); Matter of Stout, 122 Ariz. 503, 596 P.2d 29, 30 (1979); Disciplinary Board of Hawaii Supreme Court v. Kim, 59 Hawaii 449, 583 P.2d 333, 337 (1978); In re Andros, 64 Ill. 2d 419, 356 N.E.2d 573, 574

(1976). Accordingly, the due process rights of an attorney "do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case." People v. Hartmann, 638 P.2d 745, 747 (Colo. 1981).[3/]

The next consideration is the risk of erroneous determination and the probable value of additional safeguards. The thrust of Appellant's claim is that in order for the Hawaii Supreme Court to make a reliable credibility assessment, it must hear the accused attorney and witnesses personally. The findings of fact of the Hawaii disciplinary proceedings are reviewed not once, but twice. After the Hearing Committee makes a determination, its

---

3/ Any criminal case Appellant cites to support his arguments is therefore inapposite. See, e.g., Jurisdictional Statement at 37-38 citing Herring v. New York, 422 U.S. 853 (1975).

findings and recommendations are submitted to the Disciplinary Board. Hawaii Supreme Court Rule 2.7(b). The Disciplinary Board then reviews the Hearing Committee's report and briefs submitted by the accused attorney and the Disciplinary Counsel, and hears oral argument by both sides. Hawaii Supreme Court Rule 2.7(c). Only after the proceedings get to this stage does the Disciplinary Board submit its report to the Hawaii Supreme Court. The Disciplinary Board's findings are advisory only and the Hawaii Supreme Court can accept, reject, or modify any of the Board's findings. Disciplinary Board of Hawaii Supreme Court v. Kim, 59 Hawaii 449, 451, 583 P.2d 333, 335 (1978). This kind of scrutiny actually enhances the reliability of the findings, since in briefs to both the Disciplinary Board and the Hawaii Supreme Court, the

accused attorney is afforded the opportunity to single out and attack perceived weaknesses in the evidence, to alert each entity of the need to exercise discretion, and to urge that a de novo hearing would be appropriate.

The last factor to consider is the public interest at stake and the burden posed by additional safeguards. The public has a great interest at stake in attorney disciplinary proceedings. Their purpose is "to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice." In re Echeles, 430 F.2d 347, 349 (7th Cir. 1970); see also, In re Petty, 173 Cal. Rptr. 461, 627 P.2d 191 (1981); Matter of Stout, 122 Ariz. 503, 596 P.2d 29 (1979). In the present case, requiring a de novo hearing in

front of the Hawaii Supreme Court would plainly frustrate the purpose of the Disciplinary Board as an adjunct structure to the court, which was plainly "designed to free the supreme court from the burden of developing the entire record for adjudication itself." Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1437 (10th Cir. 1984), cert. den., 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985).

This Court faced similar issues in United States v. Raddatz, 447 U.S. 667 (1980), where the Court upheld a provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B), which permitted a district court to refer a suppression motion to a magistrate, and authorized the district court to decide the motion based on the record developed before the magistrate, including the magistrate's proposed proposed findings

of fact and recommendations. In Raddatz, as in the present case, the core of the challenge to the statute was "[t]he one who decides must hear." Raddatz, 447 U.S. at 677, quoting Morgan v. United States, 298 U.S. 468, 481 (1936).4/

The Court in Raddatz held that the statute did not violate Raddatz's right to procedural due process. 447 U.S. at 680. In so deciding, the Court

---

4/ Appellant relies on Morgan v. United States, 298 U.S. 468 (1936) to support his "the one who decides must hear" argument. Jurisdictional Statement at 36. Morgan also stated that the rule requiring that the one who decides must hear "does not preclude practicable administrative aid in obtaining the aid of assistants in the department. Assistants may prosecute inquires. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by subordinates. Argument may be oral or written. The requirements are not technical." Morgan, 298 U.S. at 481-482. As applied to the Hawaii attorney disciplinary procedure, Morgan therefore does not appear to support Appellant's argument.

recognized that due process requirements vary with the type of procedure under scrutiny and applied the three factors enunciated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The Court concluded that the process due at a suppression hearing, despite its potential significance, was less demanding and elaborate than the protections accorded a criminal defendant at the trial itself. Raddatz, 447 U.S. at 679. In such proceedings, due process does not require that the ultimate decisionmaker must be the person hearing the evidence. Id., at 680. In explaining this conclusion, the opinion of the Court in Raddatz noted with approval the analogy of administrative adjudications, where an agency or commission is the ultimate factfinder though the evidence is heard by a hearings officer. That is not an uncommon arrangement. Indeed, this

Court itself uses masters as advisory triers of fact when disputed factual issues appear in original actions. R. Stern & E. Gressman, Supreme Court Practice, Sec. 10.13 at 623-625 (5th ed. 1978). Such a procedure simply cannot be as constitutionally flawed as Appellant contends.

The analysis of Appellant's other due process claims must also begin and end with reference to the nature of attorney disciplinary proceedings.[5/] Appellant asserts that Hawaii Supreme Court Rules 2.4(e)(2) and 2.4(e)(3), by authorizing the Disciplinary Board to appoint the Chief Disciplinary Counsel

---

5/ Appellant also contends that due process requires that an accused attorney be afforded the opportunity to conduct discovery. This is not the case. Due process does not require pretrial discovery in attorney disciplinary proceedings. In the Matter of Wireman, 270 Ind. 344, 367 N.E.2d 1368, 1371 (1977).

as well as the Hearing Committee, wrongly consolidate the roles of prosecutor, judge, and jury into the Disciplinary Board and thereby violate his due process right to a full, fair, and impartial hearing. Jurisdictional Statement at 18, n. 8. Appellant's argument misconstrues the functions of the Disciplinary Board, Disciplinary Counsel, and Hearing Committees. These entities are all adjuncts of the Hawaii Supreme Court; it is the Hawaii Supreme Court alone that is the ultimate trier of fact as well as law. Disciplinary Board of Hawaii Supreme Court v. Kim, 59 Hawaii 449, 583 P.2d 333, 335 (1978). See also, Kitsis v. State Bar, 153 Cal. Rptr. 836, 841, 592 P.2d 323, 327-328 (1979); Matter of Logan, 70 N.J. 222, 358 A.2d 787, 788 (1976). As mere agents of the court, there may be some combination of the roles they play in

the disciplinary procedure. In the Disciplinary Matter Involving Walton, 676 P.2d 1078, 1082 (Alaska 1983); Walker v. Supreme Court of Arkansas Committee on Professional Conduct, 275 Ark. 158, 628 S.W.2d 552, 554 (1982).

Appellant claims that due process requires the Hawaii Supreme Court to provide accused attorneys the opportunity to orally argue in front of the court and furthermore requires the court to include written findings of fact and conclusions of law in its final order. Jurisdictional Statement at 39. This Court settled this issue with respect to physician disciplinary procedures in Barsky v. Board of Regents of the University of the State of New York, 347 U.S. 442 (1954). In Barsky, the Board of Regents was the ultimate trier of fact in a physician disciplinary proceeding. The investigation of charges

against the accused physician proceeded on two fronts. First of all, a medical grievance committee relied on hearings conducted by an investigative committee and recommended that the Board of Regents should find the physician guilty as charged and suspend his license for six months. Secondly, a separate Board of Regents committee conducted hearings and recommended that the Board of Regents should not find the physician guilty and not suspend his license. The Board of Regents, without any oral argument in front of it, and without stating its reasons, sustained the medical grievance committee's recommendation and suspended the physician's license for six months. The physician claimed the disciplinary procedure violated his due process rights.

The Court in Barsky found no violation of the physician's due process

rights. 347 U.S. at 456. The Court noted that all that due process required was that the Board of Regents consider both reports before it. With respect to the report that exculpated the physician, the Court stated, "[W]e see no reason to conclude that the board disregarded it or acted arbitrarily, capriciously or through prejudice and deprived appellant of due process of law." Id., at 456.

Courts have followed the precepts set forth in Barsky. With respect to the requirement of submitting written findings of fact and law, the Supreme Court of Iowa has stated, "[W]e are not persuaded that traditional concepts of error preservation must always be imposed in attorney disciplinary proceedings. To do so would be to characterize the procedure as just an unusual lawsuit. It is not." Committee on

Professional Ethics and Conduct of the Iowa State Bar Association v. Behnke, 276 N.W.2d 838, 841 (Iowa), appeal dismissed for want of a substantial federal question, 444 U.S. 805 (1979). Courts have also held that an accused attorney in a disciplinary proceeding does not have a constitutional right to orally argue in front of the ultimate trier of fact where the attorney has fully briefed his or her position to the court. Mildner v. Gulotta, 405 F. Supp. 182, 195 (E.D.N.Y. 1975); Matter of Kaiser, 489 N.Y.S.2d 735, 739 (1985); Cain v. Board of Commissioners of the Alabama State Bar, 345 So. 2d 1343, 1346 (Ala. 1977).

In the present case, the Hawaii Supreme Court stated that it based its order of suspension on "having considered the Disciplinary Board's 'Report and Recommendation for the Suspension of

Roy M. Miyamoto from the Practice of Law for a Period of Three (3) Years' and the briefs and records filed in this court." See Order of Suspension, Appendix A to Jurisdictional Statement. The Hawaii Supreme Court satisfied the requirements of due process by properly considering the material before it.[6/]

Appellant also claims that the Hawaii attorney disciplinary procedure, as applied to his case, violated his due process rights because of minor variations from the Hawaii Supreme Court

---

6/ In re Noell, 93 F.2d 5 (8th Cir. 1937), a case on which Appellant relies, Jurisdictional Statement at 40-42, is therefore irrelevant. In In re Noell, the Eighth Circuit held that the Missouri attorney disciplinary procedure violated an accused attorney's due process rights because the ultimate trier of fact did not provide the accused attorney an opportunity to submit oral or written arguments. Such is not the case here. Appellant submitted written briefs to the Hawaii Supreme Court which the court received and reviewed prior to rendering its final order.

Rules.[7/] Even assuming the truth of these allegations, Appellant's assertion of due process violations fails because he has not proved these allegations prejudiced his ability to have the Hawaii Supreme Court adjudicate the

---

7/ Appellant also asserts that the Hawaii Supreme Court does not apply a set standard when reviewing the findings of the Disciplinary Board. Jurisdictional Statement at 23, n. 13. He cites Disciplinary Board v. Kim, 59 Hawaii 449, 583 P.2d 333 (1978) (clear and convincing evidence) and In re Trask, 46 Hawaii 404, 380 P.2d 751 (1968) (preponderance of the evidence), to support this proposition. In 1972, the Hawaii Supreme Court replaced its version of the Canons of Professional Ethics with its form of the A.B.A. Code of Professional Responsibility. All that Kim and Trask stand for may be that the Hawaii Supreme Court has determined that different standards of review are applicable to alleged violations of different codes of attorney conduct. Moreover, in Kim the issue before the court was not the standard of proof, so it is not clear that the court intended to articulate a higher standard. More importantly, Appellant fails both to demonstrate that any due process violation is raised here and to establish any prejudice to himself.

complaint fairly. Courts consistently hold that minor procedural irregularities in attorney disciplinary proceedings do not deny an attorney's right to due process absent a showing of prejudice. Matter of Kaiser, 489 N.Y.S.2d 735, 738 (1985); Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Michelson, 345 N.W.2d 112, 117 (Iowa 1984); In re Morales, 196 Cal. Rptr. 353, 671 P.2d 857, 861 (1983); In the Matter of Wireman, 270 Ind. 344, 367 N.E.2d 1368 (1977).

Traditional notions of fairness help define the due process requirements of a particular procedure. Accordingly, this Court has stated, "in all cases, that kind of procedure is due process of law, which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of

the courts." Ex Parte Wall, 107 U.S. 265, 27 L. Ed. 552, 562 (1883); See also, Corn Exchange Bank v. Coler, 280 U.S. 218, 222-223 (1930); Ownbey v. Morgan, 256 U.S. 94, 108-109 (1921); People v. Hickman, 204 Cal. 470, 268 P. 909, 913 (1928).

Significantly, the Hawaii attorney disciplinary procedure conforms to similar procedures used by other courts. It appears that in a majority of states, the highest court is the final decision-maker in the disciplinary process, but it renders judgment upon the report and recommendation of a separate disciplinary committee that has actually heard and observed the witnesses testify. See American Bar Association, Survey of Lawyer Disciplinary Procedures in the United States (1984). Even this Court appears to recognize a similar procedure when disciplining members of its own

bar, referring disciplinary matters to committees for recommendations and subsequently adjudicating the matters without directly hearing testimony or oral argument from the accused attorneys. See In re Capshaw, 65 S. Ct. 673 (1945), and 67 S. Ct. 1345 (1947); In re Crow, 359 U.S. 1007 (1959) (Douglas, J., dissenting).

In light of the foregoing, it is clear that the Hawaii attorney disciplinary procedure satisfies due process requirements because it is "suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." Ex Parte Wall, 107 U.S. 265, 27 L. Ed. 552, 562 (1883).

3. THE HAWAII ATTORNEY DISCIPLINARY PROCEDURE DID NOT DEPRIVE APPELLANT OF HIS RIGHTS UNDER THE EQUAL PROTECTION CLAUSE

Appellant also claims a violation of his right to equal protection under the law. Jurisdictional Statement at 47-57. Essentially, appellant claims his equal protection rights were violated because the Hawaii attorney disciplinary procedure denies attorneys the full scope of appellate review afforded to other professions in disciplinary proceedings conducted under the Hawaii Administrative Procedure Act, Ch. 91 Hawaii Rev. Stat., and the rules promulgated thereunder.

This Court has made it clear that equal protection does not mean that states must treat all professions the same. As this Court stated with respect to Oregon's procedure for disciplining dentists:

> [The plaintiff has no] ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each.

Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 610-611 (1935) (emphasis added). See also, Pordum v. Board of Regents of the State of New York, 491 F.2d 1281, 1286 (2d Cir. 1974). Hence, an accused attorney's equal protection rights must be defined in the same way his or her due process rights are defined, i.e., with due regard to the nature of attorney disciplinary proceedings.

One court has already passed on Appellant's equal protection argument. In Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974), the plaintiff claimed

that the New York attorney disciplinary procedure violated his equal protection rights because it did not provide attorneys the full scope of appellate review afforded other disciplined professionals. The court found no equal protection violation, and in so doing pointed out that "[t]he intimate and delicate relationship between courts and lawyers has long justified the judiciary in careful scrutiny of the integrity and qualifications of those who practice before it." Id. at 141.

This result is best explained by the fact that attorneys are officers of the court. Theard v. United States, 354 U.S. 278, 281 (1957). From this relationship has arisen a unique self-disciplining system. The legal profession alone has a court both as the entity before whom the professional practices and as the tribunal which sits

in judgment on charges of professional misconduct. Appellant's focus on the procedures provided other disciplined professionals therefore ignores the fact that attorney disciplinary proceedings, unlike disciplinary proceedings afforded other professionals, are from the outset judicial rather than administrative in nature. Erdmann v. Stevens, 458 F.2d 1205, 1208-1209 (2d Cir. 1972).

The Hawaii State Legislature has vested the Hawaii Supreme Court with the sole power to revoke or suspend the license of any attorney. Hawaii Rev. Stat. § 605-1 (1976). The foregoing discussion proves a rational basis for treating attorneys and other professionals differently. "Having vested the initial determination function with the courts rather than an administrative agency, the legislature might well have concluded that the obligatory judicial

review normally -- if not presumptively -- required for administrative decisions was not required when the initial determination was by a court." Mildner v. Gulotta, 405 F. Supp. 182, 184 (E.D.N.Y. 1974) (emphasis in original); See also, In the Matter of Logan, 70 N.J. 222, 358 A.2d 787, 791 (1976).

Besides, it is baffling how the Hawaii Supreme Court is supposed to provide the appellate review sought by Appellant. It is, to begin with, the highest court in the state. There is no place left to which to appeal. Although this argument may have been plausible in New York, where the Court of Appeals could possibly be available to review a determination by one of the Appellate Divisions, it makes little sense in Hawaii.

CONCLUSION

For the reasons stated above, this appeal should be dismissed or the decision of the Supreme Court of Hawaii should be affirmed.

Respectfully submitted,

GERALD H. KIBE
Chief Disciplinary Counsel
RICHARD R. CLIFTON
Special Assistant
Disciplinary Counsel
(Counsel of Record)

Attorneys for Appellee